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Supreme Court of the United States

OCTOBER TERM, 1958

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL.,

Petitioners,

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners,

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hotel Employees Local No. 255 and Hotel and Restaurant Employees and Bartenders International Union pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on October 24, 1957.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia entered on the 8th day of January, 1957, is reprinted in the Appendix hereto (App. p. 27) and is reported at 147 F. Supp. 306. The opinion of the Court of Appeals affirming *per curiam* "on the opinion of the District Court" and the dissenting opinion of Judge Fahy are reprinted in the Appendix hereto (App. p. 25) and are reported at — US App. DC —; — F (2d) —.

JURISDICTION

The judgment and order of the Court of Appeals was entered on October 24, 1957. The jurisdiction of this Court to review the aforementioned judgment is invoked under 28 USC § 1254 (1).

The original jurisdiction of the District Court was invoked under 28 USC § 1331 in that the matter in controversy exceeded $3,000.00, exclusive of interest and costs and arose under the Constitution and laws of the United States; and also under 28 USC § 2201 to declare the rights and legal relations of the parties under the Labor Management Relations Act, 1947.

The jurisdiction of the Court of Appeals arose under 28 USC § 1291 and was an appeal from a final decision of the District Court of the District of Columbia.

The complaint alleged in substance as to jurisdiction that the decision and order of the National Labor Relations Board: (1) violated the constitutional guarantees of due process and equal protection under Amendment V of the Constitution; (2) was an unlawful assumption of legislative power in violation of Article I, Section 8 of the Constitution; (3) was in excess of statutory authority and especially the authority conferred by Section 9 (c) of the Labor Management Relations Act, 1947; and (4) was promulgated in violation of the Administrative Procedures Act. The complaint further alleged that the Plaintiff had exhausted its administrative remedies. (JA [Joint Appendix] 5, 6)

The original jurisdiction of the District Court was sustained on authority of *Leedom, et al.* v. *International Union of Mine, Mill and Smelter Workers,* 352 US 145, affirming 96 US App. DC 416; 226 F (2d) 780; ***Farmer*** v. *The United Electrical Workers,* 93 US App DC 178, 211 F (2d) 36 (1953); *DePratter* v. *Farmer,* 98 US App DC

74, 232 F (2d) 74 (1956); *Fay* v. *Douds*, 172 F (2d) 720, (CA-2, 1949; *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 89 US App. DC 24, 27, 189 F. (2d) 685, 688 (1951), and *Leedom* v. *Kyne*, — US App DC —; — F (2d) — 1957); 26 LW 2143. (See App. pp. 26, 29, 30)

QUESTIONS PRESENTED

1. Whether the provisions of Section 9 (c) of the Labor Management Relations Act are mandatory?

2. Whether the National Labor Relations Board may, consistent with the applicable decision of this court, exclude an entire industry from the coverage of the Labor Management Relations Act regardless of that industry's impact on commerce?

3. Whether the National Labor Relations Board may, consistent with the Administrative Procedures Act and the requirements of the Fifth Amendment, establish jurisdictional rules without affording interested parties an opportunity to be heard?

STATUTES INVOLVED

The relevant portions of the Labor Management Relations Act, 1947, (Act of June 23, 1947, c. 120, 80th Cong., 1st Sess., 61 Stat. 136, 29 U.S.C. § 151, *et seq.*) provide as follows:

Sec. 2 * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or

any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia, or any Territory of the United States and any State or other Territory, or between any foreign country, and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Sec. 9.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulation as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employee (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as

the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Sec. 10.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; **Provided,** That the board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

The relevant portions of the Administrative Procedures Act, (Act of June 11, 1946, ch. 324 § 2, 60 Stat. 237, 5 U.S.C. § 1001, *et seq.*) provide as follows:

Sec. 1001. Definitions. * * *

(c) Rule and rule making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Sec. 1003. Rule making.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice; publication and contents.

General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the

subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.
After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

(c) Time of publication or service of rules.
The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.
Every agency shall accord any interested persons the right to petition for the issuance, amendment, or repeal of a rule. (June 11, 1946, ch. 324, § 4, 60 Stat. 238).

INTRODUCTORY STATEMENT

This petition is a part of the same labor controversy presently pending before this court in cases Nos. 363 and 364 concerning the hotel industry in Miami and Miami Beach, Florida. In the instant case the petitioners endeavored to obtain a factual determination by the National Labor Relations Board as to their majority status as representative of the employees involved and also to obtain National Labor Relations Board intervention to prevent activities of the hotel employers in contravention of the Labor Management Relations Act, 1947. In cases Nos. 363 and 364 are set forth the results in the Florida Courts when the employees were frustrated in their peaceable attempts to secure recognition of their bargaining representative and resorted to strikes and picketing. In one of the instances referred to in case No. 363, the *San Marino* case, a representation election was ordered by the State Court. The results of that attempt are set forth on pages 13 and 14 and 17 of the petition for writ of certiorari in case No. 363.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a judgment and order of that Court dated October 24, 1957 affirming the judgment of the District Court granting respondents' motion for summary judg-

ment, overruling petitioners' motion for summary judgment, and dismissing the cause.

The facts involved herein, none of which are in dispute, are as follows:

Petitioner Hotel Employees Local No. 255 is a labor organization affiliated with petitioner Hotel and Restaurant Employees and Bartenders International Union. Both the Local and the International Union represent persons employed in the hotel industry.

Petitioner Local 255 at all times mentioned in the complaint represented a majority of the employees of the hotel members of the Miami Beach Hotel Association. Petitioner Local 255 sought to obtain recognition by these hotels and the Association as the collective-bargaining representative of said employees. The hotels and the Association refused and there were 22 separate strikes by said majority of employees for recognition. (JA 18e)

On June 29, 1955, a representation petition was filed with the National Labor Relations Board in accordance with Section 9 (c) of Labor Management Relations Act, 1947, and in accordance with the regulations prescribed by the Board. This proceeding was captioned *All Hotel Members of Miami Beach Hotel Association,* 10-RC-3135. The petition was dismissed on July 1, 1955, without investigation and without any determination as to whether there was a reasonable cause to believe that a question of representation affecting commerce existed. The dismissal by the Regional Director of the National Labor Relations Board was based solely on a "long standing policy not to exercise jurisdiction over the hotel industry." (JA 11) Petitioners appealed to the National Labor Relations Board requesting that Board to over-rule the Regional Director, to order him to investigate the representation petition, hold a hearing, and proceed to an election. Three of the five Board members refused this

request, stating that "The Board has decided to adhere to the long-established policy of not asserting jurisdiction over the hotel industry on the grounds set forth in *St. Louis Hotel Association*, 92 NLRB 1388" (JA 17). Board Member Murdock stated that he "would over-rule the Regional Director and direct that the case be sent to hearing and on the basis of a full record determine the impact of the operation of the employer herein on commerce" (JA 17). Board Chairman Guy Farmer stated that "he believed that the Board should give consideration after hearing to modifying its policy so as to take jurisdiction on a limited basis pursuant to appropriate standards."

Requests of petitioners for reconsideration were denied by the National Labor Relations Board on October 10, 1955, and January 27, 1956, respectively.

On July 7, 1955, during the pendency of the aforementioned representation proceedings, Local 255 filed unfair labor practice charges with the Regional Director of the Tenth Region alleging multitudinous violations of the Labor Management Relations Act (JA 21-26). These charges were held in abeyance until the decision of the Board in the representation matter at which time they were dismissed in conformity with the Board's policy on jurisdiction (complaint, par. 17 JA 4-5). An appeal from the dismissal of these charges was taken to the General Counsel who sustained the dismissal on the basis of the Board's aforementioned decision in the representation case, *All Hotel Members of Miami Beach Hotel Association*, 10-RC-3135 (complaint, pars. 18, 19, JA 5).

The hotel industry is the 7th largest industry in the United States, having a total annual business volume in 1954 of 7½ billion dollars. Over 500,000 persons are employed in the industry. It is an industry which is engaged in interstate commerce and it is an integral and necessary part of interstate transportation (JA 19).

The Miami Beach Hotel Association is a trade association having a membership of more than 150 hotels in the Miami Beach, Florida, area. The Association and its individual members are employers engaged in interstate commerce; their operations individually affect commerce; and a labor dispute with said Association or its members would tend to hinder and obstruct commerce and the free flow of commerce, all within the meaning of the Labor Management Relations Act, 1947 (complaint, par. 8, JA 2, 3).

Southern Florida has 2½ million visitors a year from out of the state, and a great majority of them are accommodated by the members of the Miami Beach Hotel Association. The Association member hotels, for the year ending September. 1954, received over $10! million for food and lodging furnished visitors to the State of Florida. The hotel business is by far the leading industry of southern Florida. It is an integral part of interstate transportation and, during the year ending September 1954, the airlines alone transported 1,200,000 tourists to the Greater Miami area. A substantial number of these tourists came to the Association member hotels under contracts arranged outside the State of Florida for "package tour vacations" providing a single rate for travel to Miami Beach, hotel accommodations, meals, and return travel (JA 18a-c).

The complaint in the U.S. District Court for District of Columbia prayed for a declaratory judgment that the Board may not withhold its processes and the benefits of the act on the sole grounds that hotels are involved; that the Board's order be set aside; that the Board be directed to investigate, hold a hearing, conduct an election and certify the results; and that the Board be enjoined from withholding its processes and facilities on the sole ground that hotels are involved.

The Board filed a motion to dismiss for lack of jurisdiction, or, in the alternative, for summary judgment in its favor. The Petitioners likewise moved for summary judgment in the District Court. Thus the commerce facts set forth above and alleged in the complaint and supporting affidavits were admitted.

The District Court refused to dismiss for lack of jurisdiction but granted the Board's alternative motion for summary judgment on the ground that the hotel policy was not arbitrary or capricious (App. p. 27). The order dismissing the complaint was entered on January 16, 1957 (App. p. 33).

The Court of Appeals for the District of Columbia Circuit, on appeal, affirmed the judgment of the District Court *per curiam* "on the basis of the opinion of the District Court." Judge Fahy dissenting, (App. pp. 25, 26) would have reversed the District Court, reasoning: (1) that Section 9 (c) of the Act was mandatory on the Board; (2) that the exclusion of the hotel industry as a class was contra to this Court's decision in *Office Employees* v. ***NLRB,*** **353** US 313.

The judgment and order of the Court affirming the District Court was entered on October 24, 1957. (App. p. 27)

REASONS FOR GRANTING THE WRIT

I

This case presents an important question of federal law which has not been, but should be, settled by this court; viz., whether the National Labor Relations Board may refuse to process representation petitions in accordance with the Labor Management Relations Act of 1947 when a question of representation affecting commerce exists.

This court has made it clear that state courts and state boards may not act as to labor relations matters affecting interstate commerce covered by the Labor Management Relations Act, 1947, even though the National Labor Relations Board has declined to exercise its jurisdiction.[1]

It was argued in those cases that such a holding by this court would result in creation of a "no man's land". To the extent, however, that the National Labor Relations Board asserts its jurisdiction, either voluntarily or by requirement of the Act, such a "no man's land" is eliminated. It is submitted that a decision as to the authority of the Board to refuse to assert jurisdiction is a necessary complement to *Guss*, *Fairlawn* and *Garmone*.

As to representation cases the National Labor Relations Board has refused to assert jurisdiction in arbitrarily determined categories, even though a question of representation affecting commerce exists. The question as to the existence of such authority in view of the mandatory language of Section 9 (c) of the Labor Management Relations Act, 1947, 61 Stat. 143, 29 USC § 159 (c) has never been presented to this court since the amendment of the National Labor Relations Act by the Labor Management Relations Act in 1947. We have researched this question diligently but we do not find that it has ever been determined in any federal court other than in the instant cause.

The relevant portions of said Section 9 (c) are as follows:

> "Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board * * * the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists, *shall* provide for an appropriate hearing upon due notice.

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[1] *Guss* v. *Utah Labor Relation Board*, 353 US 1; *Amalgamated Meat Cutters* v. *Fairlawn Meats*, 353 US 20; *San Diego Building Trades Council* v. *Garmone*, 353 US 26.

> * * * If the Board finds upon the record of such hearing that such a question of representation exists it *shall* direct an election by secret ballot and *shall* certify the results thereof." (emphasis supplied)

In the instant case the Board has not denied that it "had reasonable cause to believe that a question of representation affecting commerce exists". In the courts below counsel for the Board admitted that the Board has statutory jurisdiction. Further, the allegations of the complaint are, in effect, admitted by the motion for summary judgment. Therefore, the following question is squarely presented herein: assuming that the Board has reasonable cause to believe that a question of representation affecting commerce exists, may it refuse to investigate such petition, refuse to provide for an appropriate hearing upon due notice, refuse to determine upon the record of such hearing whether such a question of representation exists, and, if it so determines, refuse to direct an election by secret ballot and refuse to certify the results thereof?

The interpretation of this same numbered Section as previously worded under the National Labor Relations Act, 1935, 49 Stat. 435, prior to its amendment in 1947, was before this court in *Inland Empire District Council, etc., et al* v. *Millis*, 325 US 697 (1945). The language of Section 9 (c) which was before this court in the *Millis* case stated as follows:

> "(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board *may* investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board *shall* provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or other-

> wise, and *may* take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." (emphasis supplied)

This court held that the language "the Board shall provide for an appropriate hearing" in the above-quoted section was mandatory, but that the language "may take a secret ballot, or utilize any other suitable method to ascertain such representation" was discretionary.

Congress amended the National Labor Relations Act after the *Millis* decision. It will be noted that "may" was changed to "shall". It seems clear, therefore, that Congress intended the provisions of Section 9 (c) using the word "shall" as mandatory provisions.[2]

Judge Fahy, dissenting below, concurred in the foregoing argument as follows:

> "The Act says that the Board shall take jurisdiction of questions of representation affecting commerce. The verb "shall" was incorporated into Section 9 (c) by the Taft Hartley Act in place of "may" in the older Wagner Act. The language is also to be contrasted with that relating to unfair labor practice cases, where the Board is not required to file a complaint but is 'empowered' to do so."

The language of Section 10 (a) of the Act, 61 Stat. 146, 29 USC § 160 (a), the unfair labor practice provision referred to by Judge Fahy, reads in part as follows:

> "The Board is *empowered*, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce". (emphasis supplied).

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[2] The Board cited below *Senate Report 105, 80th Congress, First Session*, as an explanation of the present language of Section 9 (c). Those portions of the Report cited are inapposite as they deal only with the desire of Congress to permit employers and non-union employees alike to request certifications. The Report clearly evidences that the amendment to Section 9 (c) to include subsections (1), (A) and (B) specifically provided this right, but in no way mitigated the clear meaning of the mandatory language previously referred to.

Thus, when Congress intended the Board to have discretionary authority it so stated by using the specific language "empowered"; when it intended to impose a mandatory duty upon the Board it used "shall". Consistent with this language the cases relied on by the Board below in support of its alleged discretionary authority relate to unfair labor practices arising under the above-quoted Section 10 (a).

The Board argued below that a mandatory directive under Section 9 (c) and permissive authority under Section 10 (a) are inconsistent. However, in the absence of clear legislative history to the contrary, it must be assumed that the language referred to represents the intent of Congress. Further, there is no inconsistency. Congress quite properly might have decided that the Board should not have discretion to refuse to make a *factual* determination of bargaining status under Section 9 (c) in cases affecting commerce, but that in unfair labor practice cases the Board should have discretion to prosecute or not to prosecute.

Nothing in the legislative history of the Act shows an intent by Congress to grant the Board the power of determining whether or not labor relations of many thousands of employers and millions of employees are to be governed by federal law or to remain entirely ungoverned. Yet, this is the result which flows from the Board's assumed authority

If the Board is required to observe the clear mandate of the statute the "no man's land" presently thought to exist will be substantially reduced, at least to the extent that federal authority must provide for factual determinations of bargaining status.

II

The Circuit Court of Appeals for the District of Columbia in the instant cause has decided a federal question

in a way which is in conflict with the applicable decision of this court; viz., it decided that the National Labor Relations Board has the authority to exclude an entire industry, as an industry, from the coverage of the Labor Management Relations Act, 1947, regardless of that industry's impact on commerce. The decision of this court with which it conflicts is *Office Employees* v. *NLRB*, 353 US 313 (1957).

In *Office Employees* this court decided that the Board does not have the authority to exclude an entire class of employers. The language of this court's opinion is paraphrased in part in the succeeding paragraph to fit the facts of the instant ca

Here the Board has refused to assert jurisdiction over hotels as a class in the face of a clear expression of Congress as set forth in Section 2 (2) and 2 (6) that the Act should be applied to all employers who "affect commerce." While it is true that this court has sustained the Board's declination of jurisdiction in certain unfair labor practice cases because the policies of the Act may not have been effectuated "in that case"[3] it has never judicially approved the Board's renunciation of jurisdiction over an entire, and very important segment of American industrial life. The discretionary authority of the Board on a case by case basis to exclude employers whose business does not sufficiently "affect commerce" does not authorize the Board to assume Congress's authority to exclude all employers in a particular industry regardless of their impact on commerce. When Congress intended to make such exclusions it did so specifically.[4]

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[3] *NLRB* v. *Denver Building Trade*, 341 US 675.

[4] See section 2 (2) of the Act excluding persons subject to the Railway Labor Act, the United States or any governmental corporation, Federal Reserve Bank, state or political subdivision, nonprofit hospitals, etc.

The Court of Appeals in affirming *per curiam* on the basis of the opinion of the District Court, completely disregarded the holding in the *Office Employees* case, which was decided after the District Court opinion herein. As Judge Fahy, dissenting, stated below:

> "In the present case the refusal of the Board to go forward was on the basis of a decision to exclude all questions of representation involving hotels. I think this is inconsistent with *Office Employees* in which the opinion was handed down after the present case was decided by our District Court."

The Board argued before the Court of Appeals that *Office Employees* only stands for the proposition that, since labor organizations when acting as employers are specifically included within the definition of employers in Section 2 (2) of the Act, the Board could not exclude all labor organizations as a class from the Act. They argued that *Office Employees* does not prevent the Board from excluding other entire classes of employers who are not specifically named in Section 2 (2).

If this distinction is valid, then the Board may engraft any number of exceptions on the Act. In the instant case the uncontradicted record considered by the Court of Appeals reveals that the Board has chosen, for reasons known only to it, to exclude the 7th largest industry in the United States which by its nature is a vital link in the chain of commerce and which contains mammoth interstate corporations such as the Statler-Hilton and Sheraton chains and associations such as the Miami Beach Hotel Association. If it is empowered to exclude such an industry then the Board may, as its ideas change, likewise exclude the entire automobile industry, steel industry or electrical industry, etc. Such power is identical to the congressional power of repeal.

The question involved is not whether the Board will make such additional exclusions, but whether it is empowered to do so. In view of the significance of *Guss, Garmone and Fairlawn*, we submit that this Court should rule whether the Board does in fact have such legislative powers.

Further, in an analogous situation involving a portion of the construction industry the Seventh Circuit Court of Appeals reached a decision contrary to that reached by the District of Columbia Circuit herein and ordered the Board to proceed. *Joliet Contractors* v. *NLRB*, 193 F (2d) 833 (1952).

If it is assumed that employers as a class may not be excluded from the operation of the Act, is there any justification for an exception in the case of the hotel industry? The Board, quite correctly, has consistently recognized and conceded that hotels are not local in character and that their operations affect commerce within the meaning of the Act. All of the earliest Board decisions dealing with hotels contain specific findings that the employers do affect commerce.[5] Even in *In the Matter of Hotel Association of St. Louis*, 92 NLRB 1388 (1951) the Board, while basing its decision largely on precedent, recognized that the business of the employer was not local in nature.[6]

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[5] *In the Matter of Willard Hotel*, 2 NLRB 1094 (1937); *In the Matter of Raleigh Hotel Company*, 7 NLRB 353 (1938); *In the Matter of Hamilton Realty Corporation*, 10 NLRB 858 (1938); *In the Matter of Westchester Apartments, Inc.*, 17 NLRB 453 (1939); *Rutland Court Owners, Inc.* 44 NLRB 587 (1939); *Raleigh Hotel Co.*, 49 NLRB 777 (1943). Although the Board argues that these cases arose in the District of Columbia, the decisions make no such distinction.

[6] In the *St. Louis* case, the majority stated:

> "* * * the Board recently announced that it would utilize certain standards—many of them arithmetic—as a guide in determining whether or not to exercise jurisdiction where earlier precedent had sometimes appeared uncertain * * * Were we to judge this case by those standards alone jurisdiction should be exercised here."

Members Reynolds and Murdock, dissenting:

> "* * * on this record it cannot be gainsaid that the employer's operations have a substantial and important effect on interstate commerce. Indeed, our majority colleagues specifically reject the employer's contention that it is not engaged in commerce within the meaning of the Act."

In the instant case the Board likewise concedes jurisdiction,[7] and has not attempted to challenge those portions of the complaint alleging that the employer is engaged in commerce.

There is no legal justification for the alleged hotel policy. The Board, recognizing that the language of the statute covers all employers, except certain specified exceptions (of which hotels are not one), has attempted to derive its authority from a theory of "congressional approval of long established policy". Such a theory cannot be sustained.

There is no such long established policy. The birth of the hotel policy occurred in 1949, two years after the amendment of the Act, in *In the matter of White Sulphur Springs Co.*, 85 NLRB 1487. Research reveals that all previously reported decisions show an affirmative policy of asserting jurisdiction over hotels[8] and the Board has been unable to produce any decision or administrative announcement which indicates otherwise.[9] Thus the Board's reference to long established policy has no basis. In 1949 the Court of Appeals for the District of Columbia Circuit acknowledged:

> "Examination of the published indexes and digests of National Labor Relations Board decisions fails to reveal any other decision upon the policy of the Board in respect to its jurisdiction in the hotel industry, ex-

[7] The Board, in its brief below (p. 24) stated:
"* * * In the instant case (the decision) stems from a determination that, *though power exists* under all the circumstances, including the Board's limited resources, it would not effectuate the policies of the Board to exert it." (emphasis supplied).

[8] See footnote 5.

[9] The Board cited below the 1951 — 16th Annual Report of the National Labor Relations Board as evidence of long established policy. It is significant to note that no prior annual report makes any reference to any such policy.

cept in the matter of *Willard, Inc.*, 2 NLRB 1094, in which the Board exercised its jurisdiction".[10]

Any reference to reported decisions at the time of the enactment of the 1947 Act could lead only to the conclusion that the Board had an affirmative policy to assert jurisdiction over hotels. For that reason, Congressional affirmance of a contrary policy would be impossible, and the Board, although repeatedly challenged, has been unable to cite any pre-enactment statement of any Congressman, Senator or Committee which shows approval, or much less, even an awareness of the alleged Board policy.[11]

To accept the argument of Congressional approval under the circumstances set forth above would be to indulge in fanciful speculation. *Peters* v. *Hobby*, 349 U.S. 241.

III

The National Labor Relations Board in refusing its processes and the protection of the Labor Management Relations Act, 1947, has so far departed from the accepted and usual course of judicial proceedings, and the Court

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[10] *NLRB* v. *Eaneat*, 85 US App. DC 371; 179 F 2(d) 15, footnote 2. Judge Stevens dissenting stated at 179 F 2(d) 25:

"The statement of the Board in the *White Sulphur Springs* case that it has been its administrative policy adhered to since 1935 not to assert jurisdiction over the hotel industry overlooks the exercise of jurisdiction by the Board in the instant case. Moreover I think that the Board cannot properly, under the Act, have a general policy which would forbid the exercise of its jurisdiction in a particular case where, as in the instant case, commerce is involved and where, as found in the instant case, the activities of the employer have a substantial relation to commerce and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof."

[11] The Board below has relied on a post-enactment statement of Senator Taft to buttress its assertion. That post-enactment statement cannot be deemed an expression of Congressional intent any more than the contrary opinions of five Senators expressed on the floor of the Senate on July 20th and 27th, 1955, Congressional Record, 84th Congress, 1st Session, Volume 101, Part 9, pp 11008, 11636-39.

of Appeals for the District of Columbia Circuit has so far sanctioned such a departure, as to call for an exercise of this court's power of supervision.

Since 1951, when the Board first established its general jurisdictional rules, it has never accorded employers, labor organizations or employees an opportunity to be heard as to the merits of those rules. The Board's present jurisdictional rules were announced in press releases or individual cases in which the facts were limited to the particular representation question involved. The decisions, however, affected thousands of employers and millions of employees other than the specific parties involved. The validity of this method of formulating jurisdictional rules or standards has not been passed on by this court and is subject to considerable doubt.

The jurisdictional decisions of the Board clearly implement, interpret and prescribe law or policy, have a future effect, and are of general and particular applicability. They are not interpretative guides, but absolute commands to Board agents. Accordingly, it is submitted that these jurisdictional standards are "rules" within Section 1 (c) of the Administrative Procedures Act, 60 Stat. 237, 5 USC, § 1001, et seq. There is no claim by the Board that any of its jurisdictional standards, including the exclusion of hotels, have been promulgated in compliance with the notice, hearing and publication requirements of that Act.

Even if we assume, however, that the Administrative Procedures Act does not apply then accepted judicial procedure and the rudiments of fair play and the due process clause require that parties affected by the formulation of jurisdictional standards be given an opportunity to be heard and to present evidence as to whether or not any particular proposed jurisdictional rule does in

fact effectuate the purposes of the Act. The early cases of this Court upholding the constitutionality of the Act clearly contemplated that jurisdictional issues would be determined on a case by case basis, affording parties an opportunity to be heard. *Consolidated Edison Co. of New York* v. *NLRB, et al.*, (1938) 305 US 197; *Santa Cruz Packing Co.* v. *NLRB*, (1938), 303 US 453.[12]

The history of the formulation of the instant hotel rule demonstrates the Board's disregard of due process. The Board's hotel policy was adopted in the matter of *White Sulphur Springs, Inc.* (1949) 85 NLRB 1487. The evidence in the *White Sulphur Springs* case was confined to the operation of the Greenbriar Hotel and the only parties to the proceeding were a small independent union of firemen and policemen and a subsidiary of the Chesapeake & Ohio Railroad. Yet the decision affected every hotel and every hotel employee in the United States. Again in the matter of *Hotel Association of St. Louis*, 92 NLRB 1388 (1951) the evidence was limited to the operation of that association. In the instant case the Board's decision was based solely upon policy without reference to facts.

Due process is not satisfied by such a procedure. Petitioners believe that Mr. Justice Frankfurter's comment contained in his concurring opinion in *Anti-Fascist Committee* v. *McGrath*, (1951) 341 US 123, at p. 165, is particularly apposite.

> "The construction placed by the Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases running the full gamut of control

[12] The Court of Appeals below has recently recognized that parties adversely affected by an established standard are entitled to a hearing to determine the validity of its application to their particular case. *Amalgamated Association* v. *NLRB*, — US App. D.C. —, 238 F. (2d) 38 (1957); cf *Storer* v. *U.S.*, 95 US App. D. C. 176, 220 F. (2d) 204 (1955).

over property and liberty, there emerges the principles that statues should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning."

We earnestly and respectfully submit that the National Labor Relations Board has shown no respect for the requirements of fair procedure and has violated the Fifth Amendment.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS

(CAPTION)

PER CURIAM: We affirm on the opinion of District Judge Morris, 147 F.Supp. 306.

Affirmed

FAHY, *Circuit Judge, dissenting*: I would reverse. It seems to me to be inconsistent with the terms of section 9(c) of the Labor Relations Act, as amended, and therefore to constitute unlawful action by the Board, for it to refuse to assume jurisdiction over any representation case involving any hotel, notwithstanding "a question of representation affecting commerce exists."[1] The Act says that the Board shall take jurisdiction of questions of representation affecting commerce. The verb "shall" was incorporated into section 9(c) by the Taft-Hartley Act in place of "may" in the older Wagner Act.[2] The language is also to be contrasted with that relating to unfair labor practice cases,[3] where the Board is not required to file a complaint but is "empowered" to do so.[4]

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[1] 49 Stat. 453 (1935), as amended 29 U.S.C. § 159(c) (1952).

[2] See 29 U.S.C. § 159(c) (1946).

[3] Section 10 of the Act. 49 Stat. 453 (1935), as amended 29 U.S.C. § 160 (1952).

[4] Of the four labor cases on which the District Court below relied for its decision on this point, three, *NLRB* v. *Denver Bldg. Council*, 341 U.S. 675; *NLRB* v. *Stoller*, 207 F.2d 305 (9th Cir.); *NLRB* v. *Townsend*, 185 F.2d 378 (9th Cir.), dealt with unfair labor practices. The fourth, *Optical Workers* v. *NLRB*, 227 F.2d 687 (5th Cir.), though a representation case, was a denial of jurisdiction by the Board "in that case," see note 6, *infra*, because of the small amount of interstate business done by the company involved. There was no declination of jurisdiction over an entire industry. In fact, in none of the cases relied upon below was there such a declination. The only case in which the Board's refusal to exercise jurisdiction over an entire industry has been reviewed is *Office Employes* v. *NLRB*, *infra*.

There is no intimation in the Act that the public[5] or employees or employers should be denied the benefits of the representation provisions simply because a hotel is involved. We need not decide whether the Board as a matter of discretion or policy can validly decline jurisdiction of some representation questions involving hotels, though commerce should be affected within the meaning of the Act. See *NLRB* v. *Denver Bldg. Council*, 341 U.S. 675.[6] For in the present case the refusal of the Board to go forward was on the basis of a decision to exclude all questions of representation involving hotels. I think this is inconsistent with *Office Employes* v. *NLRB*, 353 U.S. 313, in which the opinion was handed down after the present case was decided by our District Court.

Jurisdiction in the District Court to entertain the action I think is amply sustained by our decision in *Air Line Dispatchers Ass'n* v. *National Mediation Bd.*, 89 U.S. App. D.C. 24, 27, 189 F.2d 685, 688; see, also, *Leedom* v. *Kyne*, —— U.S. App. D.C. ——, —— F.2d ——, and cases cited.

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[5] The public character of the rights involved has been noted often by the Supreme Court. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 363, 364, 366; *NLRB* v. *Bradford Dyeing Ass'n*, 310 U.S. 318; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265; *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 237; *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 265.

[6] It is of special note that the Supreme Court in *Office Employes* quoted the following sentence from *Denver Bldg. Council*, adding the emphasis:

> the Board sometimes properly declines to [assert jurisdiction] stating that the policies of the Act would not be effectuated by its assertion *in that case*.

353 U.S. at 318.

JUDGMENT OF UNITED STATES COURT OF APPEALS

(CAPTION)

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: Oct. 24, 1957.

Per Curiam.

Separate dissenting opinion by Circuit Judge Fahy.

OPINION OF UNITED STATES DISTRICT COURT

(CAPTION)

MEMORANDUM

Morris, J. Plaintiff Hotel Employees Local No. 255, hereinafter referred to as "Local No. 255," is an affiliate of plaintiff Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, hereinafter referred to as the "International Union." On June 29, 1955, Local 255 filed a petition for representation on behalf of a group of employees of the Miami Beach Hotel Association (a trade association with a membership of more than 150 hotels in the Miami Beach, Florida, area), hereinafter referred to as the "Hotel Association," with the Tenth Regional Office of the National Relations Board, hereinafter referred to as

the "Board," pursuant to the provisions of the National Labor Relations Act, as amended,[1] hereinafter referred to as the "Act," Section 9 (c).[2]

The Regional Director, without a hearing, on July 1, 1955, entered an order of dismissal, stating:

> On October 26, 1954, the Board issued its Decision and Order in *The Virgin Isles Hotel, Inc.*, case (110 NLRB No. 65) supplementing its recently announced standards for the assertion of jurisdiction and reiterating its long standing policy not to exercise jurisdiction over the hotel industry. Consequently, it does not appear that further proceedings are warranted inasmuch as it will not effectuate the policies of the Act to assert jurisdiction in this case.

Thereafter, at the request of Local 255, the Board reviewed the Regional Director's dismissal of the petition. Both Local 255 and the Hotel Association filed briefs and made oral arguments, and on August 26, 1955, the Board, one member dissenting, issued its decision, stating:

> * * * the Board has carefully considered the appeal filed in this case and decided to sustain the Regional Director's dismissal of the petition on the ground that

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[1] 61 Stat. 136, 29 U.S.C.A., Secs. 151, *et seq.*

[2] Section 9, in relevant part, provides:
(c) (1) Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board —
(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * * * * * *
the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

it would not effectuate the policies of the Act to assert jurisdiction over hotels. Accordingly, the petition is dismissed.

A motion for reconsideration and a second motion for reconsideration were denied by the Board on October 10, 1955 and January 27, 1956, respectively. Meantime, on July 7, 1955, Local 255 had filed charges with the Regional Director of the Tenth Region, alleging that the Hotel Association and its individual members had engaged in unfair labor practices in violation of Section 8 (1), (3) and (5) of the Act, and on August 30, 1955 (four days after the Board's decision in the representation proceeding), the Regional Director advised of his determination not to process the unfair labor practice charges, which action, on appeal, was sustained on October 14, 1955 by the General Counsel.

Asserting that the Board's decision is violative of their rights under Article I, Section 8, and the Fifth Amendment of the Constitution, and under the Act, plaintiffs seek a declaratory judgment to that effect and injunctive relief. The matter is now before the Court on motion of Defendants for dismissal, or in the alternative for summary judgment, and on motion of plaintiffs for summary judgment.

The question of whether action, preliminary to unfair labor practice proceedings under Section 10 of the Act, plainly beyond the scope of statutory authority, whether by way of departure from statutory requirements or from those of due process of law, may be reviewed by the District Court in the exercise of its equity power has been decided for this jurisdiction in the case of *Farmer* v. *The United Electrical Workers*, 93 U.S. App. D.C. 178, 211 F. (2d) 36; see also *DePratter* v. *Farmer*, decided by our Court of Appeals February 2, 1956, *Fay* v. *Douds*, 172 F. (2d) 720 (2d

Circuit), and *Leedom, et al.* v. *International Union of Mine, Mill and Smelter Workers*, S. Ct. No. 57, decided December 10, 1956. No case has been submitted nor located by the Court in which determination was made under the equity powers of the District Court requiring the Board to take jurisdiction as to any industry where the Board had determined otherwise.

The Board has consistently asserted jurisdiction over labor disputes in the hotel industry in the District of Columbia (and originally, but which it recently withdrew, in the Territories), where it may exercise plenary jurisdiction. And it has consistently declined to assert jurisdiction over hotels located in the States. Plaintiffs here complain because of the exclusion of the hotel industry, and because they were not accorded a hearing by the Regional Director.

Respecting the last mentioned complaint, I do not think plaintiffs were prejudiced by the lack of a hearing at the lower level. They were permitted to file briefs before the Board when the matter was reviewed by it, and to make oral argument. In their argument they urged that the changes in the employer-employee relations in the hotel industry since the Board's consideration of the *St. Louis Hotel Association case*, 92 NLRB 1388, decided January 17, 1951 (wherein the International Union urged the Board to adhere to its precedent of declining to exercise jurisdiction), the present size of the industry, both as to number and income, and its impact upon commerce were such as to require the assertion of jurisdiction by the Board.

The question to be faced squarely by this Court, therefore, is whether the Board has the discretionary power to decline jurisdiction over the hotel industry.

There can be little, if any question that the Congress intended to lodge in the Board, rather than in the courts, a determination of what employer-employee relationships

so affect interstate commerce as to require the exercise of the powers granted to the Board, *N.L.R.B.* v. *Stoller,* 207 F. (2d) 305, 307 (9th Circuit), certiorari denied, 347 U.S. 919, *Optical Workers' Union* v. *N.L.R.B.*, 227 F. (2d) 687, 691 (5th Circuit). Of course, such determination may not be arbitrary. Hence, the question resolves itself into whether or not the determination of the Board not to exercise its jurisdiction with respect to the hotel industry is or is not arbitrary and capricious.

The Board has, as heretofore stated, consistently taken the position since the enactment of the Taft-Hartley Act of 1947, and prior thereto, that the hotel industry, other than in the District of Columbia, and in certain instances in the Territories, does not have such impact on interstate commerce as to justify the exercise of the Board's power in view of the pressing demands upon the Board of other industries having greater impact upon interstate commerce. This established policy of the Board was not only well known and recognized in the industry, but also by organizations of employees, and was thoroughly approved by the International Union involved in the *St. Louis Hotel case, supra.* It is urged by the Board in the instant case that such established policy was also fully known to the Congress at the time of the enactment of the Taft-Hartley Act. While I agree with the plaintiffs that it may not be considered as part of the legislative history of the Act, it surely has very considerable weight on the question of whether or not the Board's action is arbitrary and capricious that one of the co-authors of the Taft-Hartley Act, Senator Robert A. Taft, stated on the floor of the Senate on August 30, 1949:

> * * * The Taft-Hartley law did not change in any way the language providing for the jurisdiction of the Board, or the general definition of interstate commerce * * *. It was not my intention in 1947, nor

> do I believe it was the intention of other members of the Committee on Labor and Public Welfare, to broaden or extend the jurisdiction of the Board in that respect. In fact, I feel very strongly that it should not be done. * * * A hotel performs its service within four walls. It ships nothing into commerce. It produces no goods for commerce. In my opinion the Act was never intended to cover the hotel industry. (Quoted from *St. Louis Hotel Association case, supra*, at p. 1390, citing Congressional Record, 81st Congress, First Session, pages 12,697 and 12,698.)

There is also judicial sanction for the exercise of such discretion as is here involved to be found in the case of *N.L.R.B.* v. *Townsend*, 185 F. (2d) 378 (9th Circuit), at 383:

> Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised. Many factors such as lack of funds or the imminence of a more drastic disruption of commerce in another industry might dictate that in a particular case powers explicitly granted should not be exercised.

There is also recognition of such administrative discretion in the case of *United States* v. *Morton Salt Co.*, 338 U.S. 632, at 647-648, in which the Supreme Court stated:

> We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns.

And subsequently, in *N.L.R.B.* v. *Denver Building and Construction Trades Council, et al.*, 341 U.S. 675, at 684, the Supreme Court stated:

> Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes prop-

erly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.

For the reasons stated, I cannot come to the conclusion that the action of the Board in the instant case was arbitrary or capricious and, therefore, defendants' motion for summary judgment will be granted, and plaintiffs' motion for summary judgment will be denied.

Counsel will prepare an appropriate order to carry this decision into effect.

/s/ Jas. W. Morris
Judge

January 8, 1957.

(Filed Jan. 16, 1957)

ORDER OF UNITED STATES DISTRICT COURT

(CAPTION)

This cause having been heard on October 19, 1956, on defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in their favor, and on plaintiffs' cross-motion for summary judgment in their favor; and the Court, having heard argument, considered the memoranda submitted, and, being fully advised in the premises, issued its opinion on January 8, 1957 granting defendants' motion for summary judgment in their favor and denying plaintiffs' motion on the ground that the action of the Board in the case was not arbitrary or capricious, it is hereby

ORDERED, ADJUDGED AND DECREED that the complaint bs, and it hereby is, dismissed.

/s/ James W. Morris
Judge, United States District Court